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Expedited Citizenship Through Military Service: Policy and Issues

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Margaret Mikyung Lee
Legislative Attorney
American Law Division

Ruth Ellen Wasem
Specialist in Social Legislation
Domestic Social Policy Division

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Expedited Citizenship through Military Service: Policy and Issues

Summary

Since the events of September 11, 2001, and the war against terrorism started with Operation Enduring Freedom and Operation Noble Eagle, there has been interest in legislation to expand the citizenship benefits of aliens serving in the military, which has increased considerably since the beginning of Operation Iraqi Freedom in March 2003. The reported deaths in action of noncitizen soldiers have drawn attention to provisions of the Immigration and Nationality Act (INA) that grant posthumous citizenship for those who die as a result of active-duty service during a period of hostilities. The INA also provides for expedited naturalization for noncitizens serving in the United States military. During peacetime, noncitizens in the military may petition to naturalize after 3 years aggregate military service rather than the requisite 5 years of legal permanent residence. During periods of military hostilities, noncitizens serving in the armed forces can naturalize immediately. On July 3, 2002, President George W. Bush designated the period beginning on September 11, 2001, as a “period of hostilities,” which triggered immediate naturalization eligibility for active-duty U.S. military servicemembers, whereupon the Department of Defense and the former Immigration and Naturalization Service announced that they would work together to ensure that military naturalization applications were processed expeditiously. This has sparked interest in legislation to further expedite the naturalization process for military servicemembers. As of February 2003, there were 37,000 noncitizens serving in active duty in the U.S. armed forces, almost 12,000 foreign nationals serving in the selected reserves, and another 8,000 serving in the inactive national guard and ready reserves.

Multiple bills provide for expedited or posthumous citizenship as the result of military service (H.R. 1275, H.R. 1588, H.R. 1685, H.R. 1691, H.R. 1714, H.R. 1799, H.R. 1806, H.R. 1814, H.R. 1850, H.R. 1953, H.R. 1954, H.R. 2887, S. 783, S. 789, S. 897, S. 922, and S. 940). Various, these bills would, among other things, reduce or eliminate the 3-year requirement for peacetime service, permit proceedings to be conducted abroad, waive processing fees, modify posthumous citizenship procedures, and provide some type of immigration benefit to surviving immediate relatives of citizens (including posthumous citizens) who die as a result of serving in active duty or, more narrowly, in a combat zone during wartime.

Of these bills, H.R. 1588 and H.R. 1954 have emerged as the two major legislative vehicles. H.R. 1588, the National Defense Authorization Act for Fiscal Year 2004, has been in conference since July 2003. On September 23, 2003, the House voted in favor of instructing their conferees to agree to the Senate-version provisions comprising the Naturalization and Family Protection for Military Members Act of 2003, concerning military naturalization and family immigration benefits. On June 4, 2003, the House passed H.R. 1954, the “Armed Forces Naturalization Act of 2003, by a 414-5 vote. H.R. 1954 was reported by the Senate Judiciary Committee with an amendment in the nature of a substitute as the Naturalization and Family Protection for Military Members Act of 2003.

This report will be updated as legislative activity occurs or other events warrant.

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Latest Legislative Developments

On September 23, 2003, the House voted in favor of instructing their conferees for H.R. 1588, the National Defense Authorization Act for Fiscal Year 2004, to agree to the Senate-version provisions comprising the Naturalization and Family Protection for Military Members Act of 2003, concerning naturalization based on military service and immigration benefits for survivors of servicemembers. As passed by the House, H.R. 1588 contained no such provisions.

On June 16, 2003, H.R. 1954, the Naturalization and Family Protection for Military Members Act of 2003, was placed on the Senate Legislative Calendar under general orders at number 142, having been reported by the Senate Judiciary Committee with an amendment in the nature of a substitute. H.R. 1954 as reported by the Senate Judiciary Committee includes the elements of S. 783 (posthumous citizenship grant procedures) and of the Kennedy amendment (S.Amdt. No. 847 re naturalization based on military service and immigration benefits for survivors of servicemembers) to H.R. 1588. On April 10, 2003, the Senate passed S. 783, which would allow the Secretary of Defense or the Secretary's designee within the BCIS to request posthumous citizenship immediately upon locating and obtaining permission from the next-of-kin.

The House of Representatives had passed H.R. 1954, the Armed Forces Naturalization Act of 2003, by a 414-5 vote on June 4, 2003. H.R. 1954, as passed by the House, contains key features of several bills introduced on the subject. It would, among other things, reduce time in military service required for naturalization to 1 year during peacetime, permit naturalization processing abroad, extend immigration benefits to immediate relatives of service members who die, and waive certain fees.

Background

Since the beginning of Operation Iraqi Freedom in March there has been considerable interest in legislation to expand the citizenship benefits of aliens serving in the military. The reported deaths in action of noncitizen soldiers have drawn attention to current provisions that grant posthumous citizenship for those who die as a result of active-duty service during a period of hostilities. Other provisions of current law set forth special naturalization rules for aliens with service in the U.S. military. This report gives an overview of the history of naturalization based on

military service, analyzes data on noncitizens in the military today, discusses current law and policy, and analyzes the issues arising from the current legislative proposals.

Brief Overview of Naturalization

Title 3, Chapter 2 of the Immigration and Nationality Act (INA) provides that all legal permanent residents (LPRs) may potentially become citizens through a process known as naturalization. To naturalize, aliens must have continuously resided in the United States for 5 years as LPRs (3 years in the case of spouses of U.S. citizens and members of the armed services); show that they have good moral character; demonstrate the ability to read, write, speak, and understand English; and pass an examination on the government and history of the United States.¹ Applicants pay fees totaling \$310 when they file their materials and have the option of taking a standardized civics (i.e., government and history of the United States) test or of having the examiner quiz them on civics as part of their interview. Naturalization duties are now handled by the Bureau of Citizenship and Immigration Services (BCIS) in the Department of Homeland Security (DHS).²

The INA also provides for expedited naturalization for noncitizens serving in the U.S. military.³ During peacetime, noncitizens serving honorably in the military may petition to naturalize after 3 years rather than the requisite 5 years of legal permanent residence. During periods of military hostilities designated by executive order, noncitizens serving honorably in the armed forces can naturalize immediately. Certain requirements for naturalization are waived for those who are serving in the U.S. military, notably the requirement to reside continuously in the United States. The INA also provides that noncitizens who die during active duty may become citizens posthumously, but prohibits surviving family members from deriving any immigration and nationality benefits from the granting of posthumous citizenship.⁴

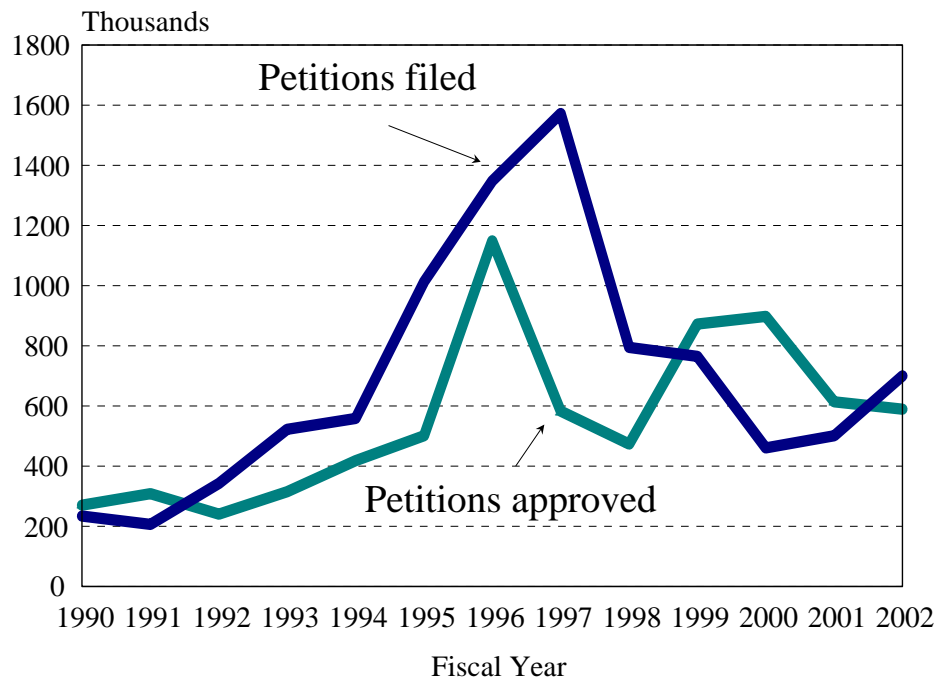
¹ The language requirement is waived for those who are at least 50 years old and have lived in the United States at least 20 years, or who are at least 55 years old and have lived in the United States at least 15 years. Special consideration on the civics requirement is to be given to aliens who are over 65 years old and have lived in the United States for at least 20 years. Both the language and civics requirements are waived for those who are unable to comply due to physical or developmental disabilities or mental impairment.

² §451(b) of the Homeland Security Act of 2002 (P.L. 107-296).

³ §329 of INA, 8U.S.C. 1440.

⁴ §329A of INA, 8U.S.C. 1440-1.

Figure 1. Naturalization Petitions Filed and Approved, FY1990-FY2002



Source CRS presentation of Bureau of Citizenship and Immigration Services data.

Note As of September 30, 2002, a total of 623,519 cases were pending.

For a variety of reasons, the number of LPRs petitioning to naturalize has increased in the past year but has not reached nearly the highs of the mid-1990s when over a million people sought to naturalize annually, as **Figure 1** depicts. Naturalization cases are generally processed in the order in which the petitions were filed. The pending caseload for naturalization remains over half a million, and it is not uncommon for some LPRs to wait 1-2 years for their petitions to be processed, depending on the caseload in the region in which the LPR lives.

Executive Order 13269

On July 3, 2002, President George W. Bush officially designated the period beginning on September 11, 2001, as a “period of hostilities,” which triggered immediate naturalization eligibility for active-duty U.S. military service members.⁵ The justification offered for this order is the war against terrorism conducted through Operation Enduring Freedom and Operation Noble Eagle in response to the September 11, 2001, terrorist attack. At the time of the designation, the Department of Defense and the former Immigration and Naturalization Service announced that

⁵ Executive Order 13269, *Federal Register*, v. 67, no. 130, July 8, 2002.

they would work together to ensure that military naturalization applications would be processed expeditiously.

Historical Background

Special naturalization provisions for aliens serving in the U.S. military date back at least to the Civil War⁶ and special enactments have been made during every major conflict since that time, up to and including the Vietnam War. The specific conditions for naturalization under the various statutes that were enacted before the INA vary.⁷ For example, the original Civil War statute affected only persons serving in the armies of the United States and did not include the Navy or Marine Corps, which were included in 1894.⁸

Among other standards under various statutes, the Civil War statute required residency of 1 year. Later statutes governing naturalization through service in the Navy or Marine Corps required service of 5 consecutive years in the Navy (the length of one tour of duty in the Navy at that time) or service for one tour of duty in the Marine Corps. Subsequent statutes have similar requirements with variations in the length of service required and the degree to which residency is waived.

The early statutes required the alien to be 21 years old and waived the now-obsolete requirement to declare one's intent to become a citizen a certain period of time prior to filing a naturalization application. The requirement of an honorable discharge dates from the Civil War statute. Statutes during World War I and the Korean War permitted naturalization proceedings to take place abroad.⁹ The World War I statute¹⁰ for the first time waived the fee during wartime; permitted reenlistment only upon the condition that the alien was in the process of becoming a citizen, i.e., had filed a declaration of intent to naturalize; and required that the naturalization application based on peacetime service have been filed while in regular service after reenlistment or within six months of honorable discharge or separation from such service (which is currently the deadline for filing) or while in reserve service after regular service. Thus, at least one term of enlistment had to have been completed before an alien could file for naturalization during peacetime. For Filipinos, that statute required 3 years of service for naturalization based on peacetime service (which is the currently required period).

Until the Vietnam War, special provisions for wartime service were generally enacted during a particular war and only covered service during that war, not for either past or prospective periods of conflict. Although §329 of the INA as enacted

⁶ Act of July 17, 1862, ch. 200, §21, 12 Stat. 594, 597.

⁷ For a discussion of the legislative history of the various military naturalization statutes, see Darlene C. Goring, *In Service to America: Naturalization of Undocumented Alien Veterans*, 31 Seton Hall L. Rev. 400, 408-430 (2000).

⁸ Act of July 26, 1894, ch. 165, 28 Stat. 124.

⁹ Act of May 9, 1918, 40 Stat. 542, and R.S. 1750, cross-referenced in that Act; Act of June 30, 1953 (Pub. L. 86), ch. 162, § 2, 67 Stat. 108, 109; BCIS Interpretations 329.1(e)(2).

¹⁰ Act of May 9, 1918, Ch. 69, 40 Stat. 542.

in 1952 included World Wars I and II, it made no provision for future periods. As a consequence, Congress enacted laws to include the Korean War and the Vietnam War. In 1968, Congress amended §329 of the INA to provide that the President is to designate by executive order such periods when the armed forces of the United States are engaged in armed conflict with a hostile foreign force.

Not every deployment of U.S. forces to an area where armed conflict occurred has been designated as a period of hostilities. Since the executive order designating the termination of the Vietnam War for naturalization purposes, only two additional periods of hostilities have been designated for such purposes. President Clinton designated the Persian Gulf Conflict as a period of hostilities, and last year President Bush designated the War on Terrorism beginning on September 11, 2001, as a period of hostilities.¹¹ Although President Reagan designated the Grenada campaign as a period of hostilities, a federal court invalidated it entirely because, in contravention of statutory guidelines for such designations, the executive order attempted to limit the expedited naturalization benefit to persons who served in certain geographic areas and the record showed that the President would not have designated the campaign as a period of hostilities without the geographic limitations.¹² As a result of the decision, President Clinton revoked the earlier Grenada designation.¹³

Military actions in Somalia, Bosnia, Kosovo, Haiti, and Panama have not been designated as a period of hostilities, although U.S. forces faced hostile conditions.

Special issues arose with regard to Filipinos who fought the Japanese in the Philippines (then a U.S. territory) during World War II. Many of these veterans served in irregular units or in the Philippine Army, had never had LPR status, and/or failed, because of bureaucratic policies of the time, to comply with certain filing deadlines. After extended litigation and debate, Congress amended §329 in 1990 to address Filipino veterans of World War II.¹⁴

During the 1950s there was a special statute authorizing naturalization for those aliens who had enlisted outside the United States and therefore had not been admitted to the United States as lawful permanent residents. Popularly known as the Lodge Act,¹⁵ it was originally enacted in 1950 and was periodically extended during the 1950s, finally expiring on July 1, 1959. Notwithstanding that service was not during a specified period of hostilities, the Act authorized naturalization under §329 of an alien who enlisted or reenlisted overseas under the terms of the Act; subsequently entered the United States, American Samoa, Swains Island, or the Canal Zone pursuant to military orders; completed 5 years of service; and was honorably

¹¹ Executive Order 12939, *Federal Register*, v. 59, no. 228, Nov. 22, 1994; and *Federal Register*, v. 67, no. 130, Jul. 8, 2002.

¹² Executive Order 12582, *Federal Register*, v. 52, no. 23, Feb. 2, 1987; *Matter of Reyes*, 910 F. 2d 611 (9th Cir. 1990).

¹³ Executive Order 12913, 59 *Federal Register*, no. 89, p. 23115 (May 4, 1994).

¹⁴ P.L. 101-649, §405, 104 Stat. 5039 (1990).

¹⁵ Act of June 30, 1950, 64 Stat. 316.

discharged. Such an alien was deemed lawfully admitted for permanent residence for the purposes of naturalization under §329.

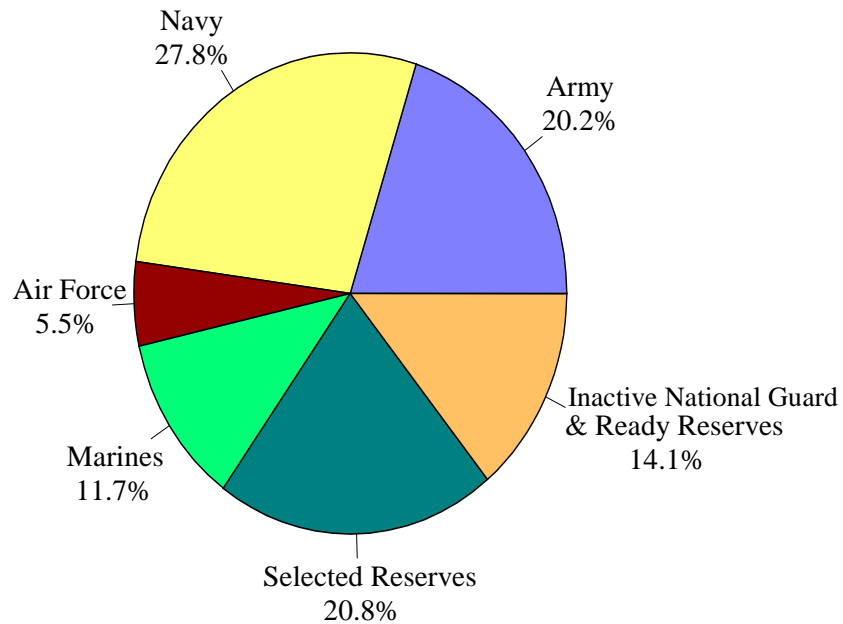
Prior to the current statute concerning posthumous citizenship for persons who die as a result of active-duty service during periods of hostilities, there was no public law for posthumous conferral. Posthumous grants of citizenship were accomplished through private laws for specific individuals. These private laws usually specified that no immigration benefit accrued to the surviving immediate relatives as a result of the posthumous grant and the current statute contains such a clause. Authority to grant posthumous citizenship was added by the Posthumous Citizenship for Active Duty Service Act of 1989.¹⁶

Noncitizens in the Military

As of February 2003, over 37,000 noncitizens serve among the 1.4 million persons in active duty status in the Army, Navy, Air Force and Marines, and these foreign nationals comprise 2.6% of those in active duty. This number is up from almost 23,000 in December 2000 and just over 31,000 in December 2001.¹⁷ Almost 12,000 foreign nationals are serving in the Selected Reserves, and another 8,000 are serving in the Inactive National Guard and Individual Ready Reserves. As **Figure 2** illustrates, the Navy has the largest number of foreign nationals (15,845 or 27.8% of all noncitizens in military), followed by the selected reserves (11,861 or 20.8%) and the Army (11,523 or 20.2%).

¹⁶ §2(a) of P.L. 101-249, 104 Stat. 94 (1990).

¹⁷ These Department of Defense data are approximate since current citizenship status is not reported for every servicemember.

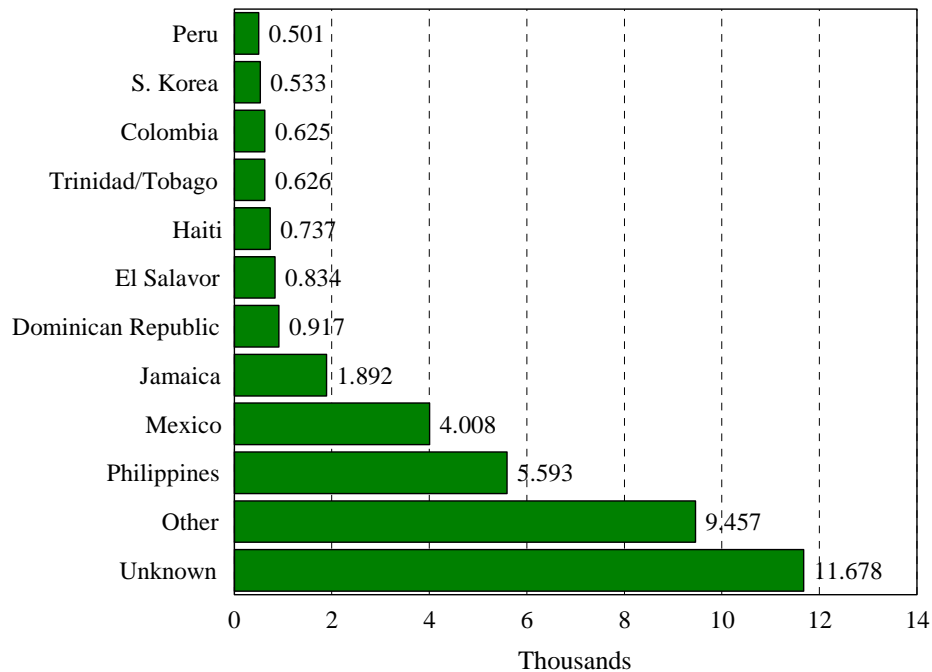
Figure 2. Noncitizens in the U.S. Military by Service Area

57,754 as of February 2003

Source CRS analysis of Department of Defense data.

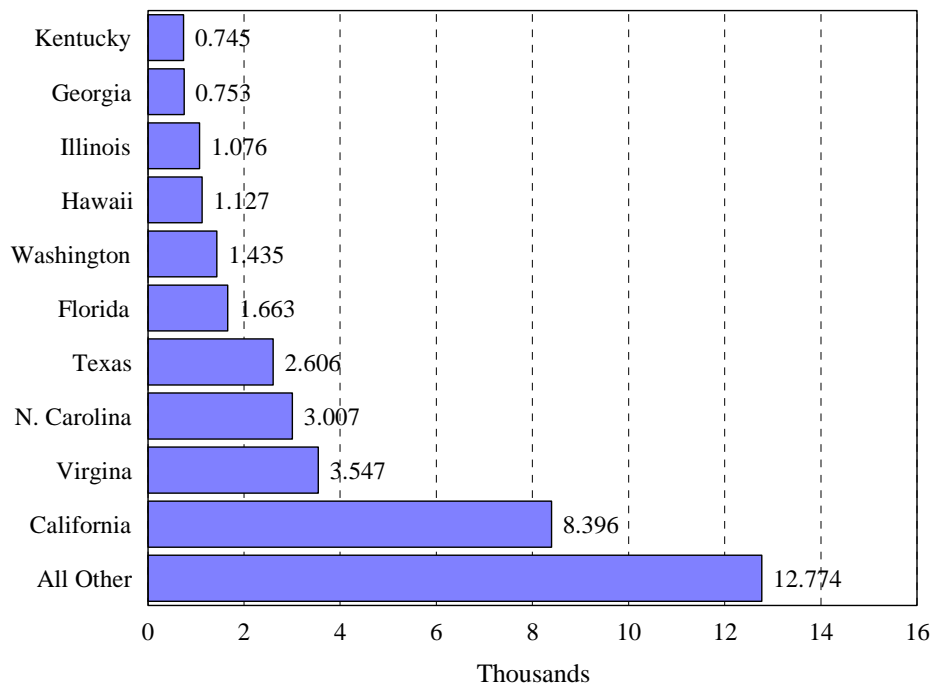
Foreign nationals from the Philippines comprise the largest single country of citizenship for aliens in the armed forces, although the Department of Defense does not have citizenship data for about 11,000 foreign nationals in the military. Mexico is the second largest source country, followed by Jamaica, El Salvador, and Haiti. The top ten source countries are rounded out by Trinidad and Tobago, Colombia, South Korea and Peru, as **Figure 3** depicts.

Figure 3. Top Ten Countries of Citizenship for Noncitizens in the U.S. Armed Forces



Source: CRS analysis of Department of Defense data as of February 2003.

As one might expect given the distribution of foreign born in the United States, California leads as the designated duty state — 22.6% of all aliens in the military. Virginia (9.6%), North Carolina (8.1%), and Texas (7.0%) follow. As **Figure 4** presents, the remainder of the top 10 states are Florida, Washington, Hawaii, Illinois, Georgia and Kentucky. The state designated by the noncitizen is not necessarily the state in which the alien has resided for the longest period of time or where his or her family lives. The state designated is place where the alien's unit is located. **Appendix A** lists the number of aliens that have designated each state.

Figure 4. Top Ten States of Noncitizens in the U.S. Armed Forces

Source: CRS analysis of Department of Defense data as of February 2003.

Current Law

There are currently two sections of the INA that provide for expedited naturalization based on military service and one section that provides for posthumous naturalization based on military service. Another provision waives the naturalization fees for aliens naturalized through active-duty military service during a period of hostilities, but not for peacetime service. These provisions are discussed below.

Naturalization Through Service During Peacetime

Section 328 of the INA (8 U.S.C. §1439) provides for expedited naturalization through military service during peacetime. The current administrative view is that Service does not have to be in active-duty status and may include service in an inactive reserve unit, including a federally recognized National Guard organization.¹⁸ There is no waiver of fees for naturalization based on this provision. The following conditions apply to naturalization under this provision:

- The applicant must have served at least 3 years in aggregate and file the naturalization application while still in the service or within 6 months of leaving the service.

¹⁸ Bureau of Citizenship and Immigration Services (BCIS) Interpretations §328.1(b)(4)(iii).

- There must be current honorable service or discharge (unlike §329, this section does not provide for discretionary revocation in the event of discharge under other than honorable conditions).
- The usual specified periods of residence or physical presence in the United States, a state, or immigration district are not required in order to file an application. No current residence within a particular state or immigration district is required.
- Other naturalization requirements must be satisfied, including good moral character, allegiance to the United States and its Constitution, knowledge of civics and English, etc.
- The applicant need not be a legal permanent resident or lawfully admitted to the United States; however, current enlistment requirements permit only a citizen or lawful permanent resident to enlist.
- The provision of 8 U.S.C. §1429 prohibiting naturalization of a person subject to a final order of removal is waived.
- Where military service periods were not continuous for 3 years, the requirements for naturalization, including residency, must be proved for any non-service period within 5 years before the date the naturalization application was filed.

Naturalization Through Active-Duty Service During Hostilities

Section 329 of the INA (8 U.S.C. §1440) provides for expedited naturalization through U.S. military service during periods of hostilities. The conditions for eligibility include the following:

- The applicant must have served in active-duty status during a designated period of hostilities. No specified period of service is required prior to application.
- There must be honorable service and discharge (Statute states that naturalization *may* be revoked if the servicemember is discharged under other than honorable conditions, but such revocation arguably raises constitutional issues).
- No specified period of residence in the United States prior to application is required. No current residence or physical presence within the United States, a particular state, or immigration district is required.
- Other naturalization requirements must be satisfied, including good moral character, allegiance to the United States and its Constitution, knowledge of civics and English, etc.
- The servicemember must have either (1) been in the United States or a U.S. territory at the time of enlistment, whether or not the enlistee was a legal permanent resident, or (2) been admitted as a lawful permanent resident after enlistment.
- The provision of 8 U.S.C. §1429 prohibiting naturalization of a person subject to a final order of removal is waived.
- An applicant may be naturalized regardless of age, i.e., a minor serving in the military may naturalize of his/her own accord under this provision.

Section 3 of P.L. 90-633, 82 Stat. 1344 (1968), found at 8 U.S.C. §1440e, waives the fees for a naturalization application made under §329 of the INA based on active-duty service during the Vietnam War or subsequently designated periods of hostilities, but only if such application is made during the period of hostilities. Thus, servicemembers filing now do not have to pay the fees. This appears to date back to a World War I statute that waived fees during wartime for applications based on military service during that war.

The definition of “active-duty” under this provision is determined by the service branch of the armed forces in which the noncitizen served, pursuant to the statutory definition in Title 10 of the U.S. Code, concerning the armed forces.¹⁹ According to this definition, “active-duty” does not include inactive service in a reserve unit or inactive or non-federalized active service in a National Guard unit.²⁰ Active-duty service need not be in a combatant capacity.²¹ The service branch also determines whether the service was honorable and whether the applicant was honorably discharged. The service branch provides a duly authenticated certification of the relevant particulars of the applicant’s military service.

There is no coverage of periods where U.S. military forces are deployed to hostile situations which technically are not deemed armed conflict with a hostile foreign force, such as peacekeeping missions.

Posthumous Naturalization Through Active Duty Service

Section 329A of the INA (8 U.S.C. §1440-1) provides for posthumous naturalization where death resulted from serving while on active-duty during World War I, World War II, the Korean War, the Vietnam War, or other designated periods of hostilities. Before this addition to the INA, posthumous citizenship could only be granted via the enactment of private legislation. As originally enacted, the next-of-kin or other representative had to file a request for posthumous citizenship within two years of the date of enactment (March 6, 1990) for past hostilities or of the death of the noncitizen member of the armed forces for periods of hostilities after the date of enactment. Many persons who would have requested posthumous citizenship for an eligible individual did not learn about this provision until after the deadline regarding persons who died during past hostilities, and legislation was enacted in the 107th Congress to extend the deadline.²² The conditions for a posthumous grant include the following:

- The deceased must have served honorably in an active-duty status in the U.S. military during World War I, World War II, the Korean

¹⁹ 10 U.S.C. § 101(d).

²⁰ For more information on the reserve components, see CRS Report RL30802, *Reserve Component Personnel Issues*, both by Lawrence Kapp; and the CRS Electronic Briefing Book on Terrorism under the heading “Military Force Structure,” found at [<http://www.congress.gov/brbk/html/ebter188.html>].

²¹ BCIS Interpretations §329.1(c)(4)(iv).

²² P.L. 107-273, §11030, 116 Stat. 1836 (2002).

War, the Vietnam War, or other designated periods of hostilities under §329 of the INA.

- Death was a result of injury or disease incurred in or aggravated by service during a period of hostilities.
- The deceased must have either (1) been in the United States or a U.S. territory at the time of enlistment, whether or not the enlistee was a legal permanent resident, or (2) been admitted as a lawful permanent resident after enlistment.

A request for posthumous citizenship may be filed by the next-of-kin or other representative, as defined by the Secretary of Homeland Security,²³ who shall approve such a request if:

- The request is filed not later than 2 years after the date of enactment of the Posthumous Citizenship Restoration Act of 2002 (November 2, 2002) or the death of the servicemember, whichever is later.
- The service branch under which the person served certifies that the person served honorably in an active-duty status during a designated period of hostilities and died because of such service.
- The Secretary finds that the person either enlisted in the United States or its territories or was admitted as a lawful permanent resident after enlistment.

Documentation of a posthumous grant of citizenship is sent to the next-of-kin or representative who requested the grant. Essentially, posthumous citizenship is a symbolic honor accorded noncitizens who gave their lives in defense of the United States and has no substantive effect on the immigration status of surviving family. No benefits accrue to survivors of the deceased as a result of the posthumous grant of citizenship, such as naturalization of a spouse under § 319(d) of the INA (8 U.S.C. §1430(d)), discussed below, and derivative naturalization of children, which would have been the benefits of actual naturalization of the service member if he or she had survived. There is no waiver of fees for posthumous citizenship.

²³ The “next-of-kin” and “other representative” are both defined in current regulations. The next-of-kin means the closest surviving blood or legal relative of the decedent in the following order of succession: 1) the surviving spouse; 2) the surviving child or children if there is no surviving spouse; 3) the surviving parent(s) if there is no surviving spouse or child; 4) the surviving siblings if there is no surviving spouse, child, or parent. Other representative includes the following: 1) the executor or administrator of the decedent’s estate, including a special administrator appointed for the purpose of requesting posthumous naturalization; 2) the guardian, conservator or committee of the next-of-kin; 3) a service organization listed in 38 U.S.C. §3402, chartered by Congress or a State, or recognized by the Department of Veterans Affairs. 8 C.F.R. §392.1.

Naturalization of Widow/er of a U.S. Citizen

Section 319(d) of the INA (8 U.S.C. §1430(d)) provides for the naturalization of the surviving spouse of a U.S. citizen who died while serving honorably in an active-duty status in the armed forces of the United States. The spouse and U.S. citizen servicemember must have been living in marital union at the time of the citizen's death. All the other usual requirements for naturalization must be satisfied except that no prior residency or physical presence in the United States, a state, or immigration district is required to file a naturalization application.

Other Relevant Laws and Issues

Naturalization Restrictions. Those who have requested exemption from selective service registration or a draft, or discharge on grounds of alienage or noncitizenship,²⁴ are generally barred from naturalization.²⁵ Those who have deserted from the armed forces or evaded the draft are also explicitly barred from naturalization;²⁶ they may possibly be otherwise barred for failing to satisfy the requirement of good moral character or for being dishonorably discharged or disciplined, which would tend to show lack of good moral character.²⁷ The bar is permanent and even if a draft evader subsequently enlists and serves honorably, he is barred absent an act of Congress or a grant of amnesty by the President removing the bar.²⁸ Similarly, a conviction for desertion would have to be vacated or pardoned in some manner to remove the naturalization bar.²⁹

Restrictions on Alienage in the Armed Forces. Although under federal statutes and regulations legal permanent resident aliens may enlist in the active and

²⁴ Between 1918 and 1971, selective service laws permitted any alien to request exemption from military service obligation in exchange for permanent ineligibility to naturalize, even if the alien subsequently changed his mind and served honorably in the U.S. armed forces during a period of hostilities. In 1971, the laws were amended to permit only nonimmigrant aliens to be exempt. Additionally, treaties between the United States and certain countries exempt each country's nationals from military service in the other country. See 8 C.F.R. Part 315; Charles Gordon, et al, *Immigration Law and Procedure*, §95.04[2][e] (through release no. 96, May 2002); Captain Samuel Bettwy, *Assisting Soldiers in Immigration Matters*, 1992 Army Law. 3, 10 (1992).

²⁵ 8 U.S.C. §1426. According to BCIS Interpretations 329.1(d), the administration formerly interpreted this section as barring naturalization even where the federal government initiated the discharge and the service was otherwise honorable. However, the BCIS now follows the holding in *In re Watson*, 502 F. Supp. 145 (D.D.C. 1980), that the disqualification does not apply where the federal government, not the alien, sought the discharge on alienage grounds for its convenience. In this case, a nonimmigrant alien was mistakenly permitted to enlist in the National Guard and was eventually discharged when the error was discovered, despite having served on active-duty during the Vietnam War period.

²⁶ 8 U.S.C. §1425.

²⁷ Bettwy, *supra* note 25, at 14.

²⁸ Charles Gordon et al., *supra* note 25, at §95.04[2][d]; Bettwy, *supra* note 25, at 10-11.

²⁹ Bettwy, *supra* note 25, at 11.

reserve forces of the military,³⁰ there are certain restrictions with regard to reenlistment and eligibility for certain ranks and occupations. By statute, only U.S. citizens are eligible for certain officer commissions.³¹ Additionally, positions requiring security clearance are generally restricted to U.S. citizens. The major exception to the citizenship restrictions concerns citizens of the Federated States of Micronesia or the Republic of the Marshall Islands, who may serve in the U.S. armed forces pursuant to the Compact of Free Association between the United States and those countries, under which the United States provides for the defense of those countries;³² since those countries do not maintain their own armed forces, their citizens who serve in the U.S. armed forces in effect are serving in the defense of their own countries.

Some service branches restrict the amount of time that a noncitizen can serve. By regulations, the Army limits a servicemember to 8 years of service in noncitizen status.³³ If a person reaches the 8-year limit by the end of the current term of enlistment, that person will be barred from reenlisting. The current enlistment term can be extended for a maximum of 12 months to allow the servicemember sufficient time to complete naturalization procedures, but not more than 90 days beyond the expected date of the naturalization ceremony.³⁴ Certain occupations requiring security clearance such as intelligence operations and special forces, require U.S. citizenship, in some instances, not just of the servicemember, but of immediate family members, and some are further restricted to citizens at birth;³⁵ dual citizenship is a negative factor.³⁶

³⁰ 10 U.S.C. §§12102, 3253, 8253; see also Department of Defense Directive No. 1304.26, E1.2.2.1 & E1.2.2.2 (Dec. 21, 1993 with change of March 4, 1994) (hereafter cited as DOD Directive). The statutes concern enlistment in the Army, Air Force, and Reserve components. Although no statute restricts enlistment to citizens and lawful permanent residents in the Navy and Marine Corps, they usually apply the same citizenship requirements as the Army and Air Force; see Department of the Navy, COMNAVCRUITCOMINST 1130.8F, *Navy Recruiting Manual-Enlisted*, Chapter 2D (March 30, 2001), and MCO P1100.72B, *Military Procurement Manual, Vol. 2, Enlisted Procurement*, §3221 (Dec. 10, 1997).

³¹ 10 U.S.C. §§532, 12201; see also, DOD Directive at E1.2.2.3. U.S. citizenship is required to be a commissioned or warrant officer, except for a reserve appointment, for which a person must have lawful permanent resident status. National Guard officers must be U.S. citizens under 32 U.S.C. §313.

³² 99 Stat. 1770 (1986), reprinted at 48 U.S.C. §1681 note.

³³ Department of the Army, Regular Army and Army Reserve Enlistment Program/Army Regulation 601-210, §§2-4.a.(5), 3-4.b (Feb. 28, 1995). (Hereafter cited as Army Regulation 601-210.)

³⁴ Department of the Army, Army Regulation 601-280, *Army Retention Program*, §4-9.k (March 31, 1999). (Hereafter cited as Army Regulation 601-280.)

³⁵ Army Regulation 601-210, §5-60; Program 9-A, Line 4.f & g; Program 9-B, Line 4.c.8.d and Line 7.f; Program 9-F, Line 4.k.

³⁶ 32 C.F.R. §§154.7(f), 154.16(f), Part 154, Appendix H.

The Air Force restricts noncitizens to one term of enlistment: they cannot reenlist unless they have become a citizen, but an extension of the original enlistment is available to an airman who has filed an application for naturalization.³⁷ The extension may not exceed the earlier of (1) six months or (2) the date of the expected naturalization ceremony plus 30 days. However, additional extensions may be granted.

Apparently there are no explicit statutory or regulatory restrictions on reenlistment in the Navy or the Marine Corps.

Although it is a component of the armed forces, the Coast Guard is not generally under the jurisdiction of the Department of Defense, but rather formerly under the Department of Transportation and now under the Department of Homeland Security, which promulgates the regulations governing enlistment. There are no statutory citizenship restrictions. The Coast Guard requires U.S. citizenship or LPR status for enlistment.³⁸ Nonimmigrants may not enlist. LPRs with any prior military service may not enlist; this restriction may not be waived. Noncitizens in the Coast Guard are not eligible to be officers³⁹ nor are they eligible for positions requiring final determination of security clearance.⁴⁰

Despite the foregoing restrictions, nonimmigrant and even undocumented (i.e., “illegal”) aliens have apparently enlisted in the military at times.⁴¹

Expedited Naturalization for Extraordinary Contributions to National Security. Although not enacted to benefit U.S. military servicemembers, expedited naturalization for extraordinary contributions to national security under 8 U.S.C. §1427(f) may have relevance in the context of aliens who provide valuable military intelligence. For example, some are proposing to confer citizenship on Mohammed al-Rehaief, the Iraqi citizen who provided information that enabled the rescue of U.S. prisoner-of-war Jessica Lynch via a private law effective upon enactment.⁴² Mr. al-Rehaief may possibly qualify for naturalization under 8 U.S.C. §1427(f), although the legislative history indicates that this provision is primarily intended to benefit those aliens who have provided invaluable intelligence in the

³⁷ Secretary of the Air Force, Air Force Instruction 36-2606, *Reenlistment in the United States Air Force*, paragraphs 3.12, 4.5.4 (Nov. 21, 2001).

³⁸ U.S. Coast Guard of the U.S. Department of Transportation, Coast Guard Recruiting Manual (COMDTINST M1100.2D) Art. 2.C.1.e & f (March 23, 1999). (Hereafter cited as CG Recruiting Manual).

³⁹ *Ibid.*, at Art. 4.A.1.f.

⁴⁰ *Ibid.*, at Art. 2.C.1.f.4.c and Table 2-C.

⁴¹ *E.g.*, see *In re Watson*, 502 F. Supp. 145 (D.D.C. 1980), *supra* note 26, involving a nonimmigrant mistakenly permitted to enlist in the National Guard, contrary to enlistment rules.

⁴² See Brie Zeltner, *Retired Marine Wants to Honor Iraqi Hero*, Cleveland Plain Dealer, April 10, 2003, at B1, and online petition at [<http://www.petitiononline.com/POWHELPR/petition.html>] (last visited on April 21, 2003).

course of a long-term relationship with the United States.⁴³ This provision permits a maximum of five aliens per year to be naturalized upon a determination by the Director of Central Intelligence, the Attorney General, and the Commissioner of Immigration (currently, the Homeland Security Secretary and the Director of BCIS respectively, pursuant to transferred authority) that such aliens have made an extraordinary contribution to national security or intelligence activities. The Director of Central Intelligence must inform the congressional committees on Intelligence and the Judiciary prior to the filing of an application under this provision. The usual residence and physical presence requirements are waived, but the alien must be otherwise eligible for naturalization and have continuously resided in the United States for one year prior to naturalization. The alien must also not have participated in persecution, serious crimes, or terrorism, or be a danger to the security of the United States. The naturalization ceremony may take place in any federal district court regardless of residency and the conduct of naturalization proceedings must be consistent with the protection of intelligence activities.

Legislative Issues

Legislation

During the 107th Congress, there was renewed legislative interest in amending the various naturalization provisions based on military service as a result of the launching of the War on Terror, the campaign in Afghanistan, and the prospect of an armed confrontation in Iraq. This interest has continued in the 108th Congress and developed momentum in the wake of Operation Iraqi Freedom.

Legislation in the 107th Congress. In the 107th Congress, four bills were introduced that would have changed the military naturalization statutes. H.R. 1616, introduced by Representatives Keller and Diaz-Balart, would have amended §328 of the INA by providing for the issuance of a certificate of citizenship to any LPR who completes three years of honorable active-duty service or is discharged due to wounds which resulted in the award of a Purple Heart; the naturalization application could be filed abroad. H.R. 3959, introduced by Representative Lofgren, would have amended §329 of the INA to include Operation Enduring Freedom as a period of hostilities. H.R. 4058, introduced by Representative Lofgren, would have amended §329 of the INA to include Operation Joint Endeavor and Operation Enduring Freedom as a period of hostilities. H.R. 4575, introduced by Representative Frost, would have amended §328 of the INA in three ways: (1) it would reduce the

⁴³ See H.Rept. 99-373, at 22 (1985) — “The conferees expect that the authority provided by Subsection 316(g) will be used to reward those aliens who for a significant time have maintained a relationship with the United States. Only in rare instances should expedited citizenship be afforded to defectors with no previous relationship with the United States, and only after careful scrutiny should the promise of expedited citizenship be offered as an inducement for future services The conferees emphasize that private immigration legislation remains the preferred method for processing exceptions to [the INA] the Executive Branch should, in each case, determine whether a private bill or use of the waiver authority provided for in subsection 316(g) is most appropriate.”

aggregate period of service required from 3 years to 2 years; (2) it would waive all fees in connection with the naturalization application; and (3) it would require that any applications, interviews, filings, oaths, ceremonies, or other proceedings relating to naturalization be available through U.S. embassies and consulates and, as practicable, U.S. military installations abroad.

Legislation in the 108th Congress. In the 108th Congress, the legislation has two general purposes: to further expedite the peacetime and wartime military naturalization statutes and to expand the posthumous citizenship statute, including those that would extend some type of immigration benefit to surviving family of the servicemember. As of September 30, 2003, 17 bills contain provisions on expedited or posthumous citizenship as the result of military service. Eleven of these bills (H.R. 1275, H.R. 1588, H.R. 1714, H.R. 1806, H.R. 1814, H.R. 1850, H.R. 1953, H.R. 1954, H.R. 2887, S. 789, S. 897, S. 922, and S. 940) would further expedite citizenship. Eight bills (H.R. 1588, H.R. 1685, H.R. 1691, H.R. 1799, H.R. 1814, H.R. 1850, H.R. 1954, H.R. 2887, S. 783, and S. 922) would modify posthumous citizenship and/or extend benefits to surviving relatives. Four of these bills (H.R. 1588, H.R. 1814, H.R. 1850, H.R. 1954, H.R. 2887, and S. 922) combine both purposes.⁴⁴

The bills that would further expedite citizenship generally include one or more of the following elements:

- The aggregate period of service required to qualify for expedited naturalization based on peacetime service would be reduced. Among the bills the reduced period varies from two years to no specified period, i.e., upon enlistment, a servicemember would be immediately eligible to apply for naturalization.
- The fee for naturalization based on peacetime service would be waived.
- Upon his or her request or application, a servicemember who is sent to a combat zone during a period of hostilities would receive automatic citizenship upon deployment to the combat zone or upon taking the oath of allegiance.
- The fee for naturalization based on active-duty wartime service would be waived, regardless of whether or not the application was filed during the period of hostilities on which the application is based.
- Naturalization proceedings could be conducted abroad in U.S. embassies, consulates and military bases.
- For naturalization based on peacetime service, there would be the possibility of revocation of naturalization for other than honorable discharge.

⁴⁴ For more specific comparisons of the legislation, see CRS Congressional Distribution memorandum, *Expedited Citizenship Through Military Service: Comparisons of Main Features of Legislation*, by Margaret Mikyung Lee and Ruth Ellen Wasem, May 1, 2003.

- There would be priority processing of naturalization applications based on military service.
- References to the Attorney General would be changed to references to the Secretary of Homeland Security.
- Naturalization based on wartime service would be extended to include members of the Selected Reserve (the Selected Reserve contains those units and individuals most essential to wartime missions, in accordance with the national security strategy).

There are eight bills (H.R. 1685, H.R. 1691, H.R. 1799, H.R. 1814, H.R. 1850, H.R. 1954, S. 783, and S. 922) that would modify posthumous citizenship and/or extend benefits to surviving relatives. Six of these bills (H.R. 1685, H.R. 1799, H.R. 1814, H.R. 1850, H.R. 1954, and S. 922) would provide some type of immigration relief or benefit to surviving relatives of citizens and/or aliens who die in combat. These bills generally include one or more of the following elements:

- The Secretary of Defense could request posthumous citizenship on behalf of a servicemember who dies as a result of active-duty service during a period of hostilities. Some bills provide that this would be done at the request of next-of-kin, while others do not.⁴⁵
- Immigration benefits would be extended to immediate relatives (spouse, child or parent) of a posthumous citizen or of an alien who dies in a combat zone.
- Immigration benefits would be extended to immediate relatives of a U.S. citizen who dies as a result of active-duty service during a period of hostilities or, more narrowly, in a combat zone.
- The fee for a posthumous citizenship grant would be waived.
- The effective date would be September 11, 2001, to benefit all those who have died since the start of the war on terrorism and their surviving relatives.
- References to the Attorney General would be changed to references to the Secretary of Homeland Security.

On April 10, 2003, the Senate passed S. 783, which would allow the Secretary of Defense or the Secretary's designee within the Bureau of Citizenship and Immigration Services to request posthumous citizenship immediately upon obtaining permission from the next-of-kin. This bill was received in the House and referred to the House Committee on the Judiciary.

On June 4, 2003, the House of Representatives passed H.R. 1954, the Armed Forces Naturalization Act of 2003, by a 414-5 vote. The bill, introduced by Representative Sensenbrenner, Chairman of the House Committee on the Judiciary,

⁴⁵ Although the revisions are intended to facilitate the process by relieving next-of-kin from having to handle bureaucratic matters at a time of bereavement, the proposed legislation which would permit the Secretary of Defense to file for posthumous citizenship upon the request of the next-of-kin would eliminate the alternative of permitting representatives other than the next-of-kin to request posthumous citizenship. This could pose problems where a deceased servicemember had no next-of-kin remaining, but may have friends who wish to honor him.

combined the salient aspects of the bills previously introduced and had been reported favorably as amended by the House Committee on the Judiciary.⁴⁶ As passed by the House, it would reduce the period of service required for naturalization based on peacetime service from 3 years to 1 year for applications pending or filed on or after the date of enactment; permit discretionary revocation of naturalization through peacetime or wartime service if the citizen were discharged from military service under other than honorable conditions before serving honorably for an aggregate period of 5 years, for citizenship granted on or after the date of enactment; waive fees for naturalization based on military service during peacetime or wartime and for posthumous citizenship grants for applications filed and certificates issued on or after the date of enactment; and permit naturalization processing overseas in U.S. embassies, consulates, and military bases. It would also expand immigration benefits available to the immediate relatives (spouses, children, and parents) of citizens, including posthumous citizens, who die from injuries or illnesses resulting from serving in active duty on or after September 11, 2001. Such relatives would remain classified as immediate relatives of a U.S. citizen for immigration purposes, notwithstanding the death of the servicemember, and could self-petition for immigrant status. Immediate relatives must self-petition within 2 years of the date of the servicemember's death or, in the case of posthumous citizens, the date on which posthumous citizenship is granted. The public charge grounds for inadmissibility would be waived. However, surviving parents of the deceased citizen servicemember would have to be lawfully authorized to be in the United States on the date of the servicemember's death in order to be eligible for the immigration benefits under H.R. 1954; temporary absence from the United States to visit abroad would not affect eligibility. Expedited naturalization for the LPR spouse of a U.S. citizen who dies as a result of serving in active duty during wartime would include spouses of posthumous citizens. References to the Attorney General in the relevant sections of the Immigration and Nationality Act would be changed to references to the Secretary of Homeland Security, effective retroactively as of March 1, 2003.

On June 16, 2003, H.R. 1954, the Naturalization and Family Protection for Military Members Act of 2003, was placed on the Senate Legislative Calendar under general orders at number 142, having been reported by the Senate Judiciary Committee with an amendment in the nature of a substitute (without a written report). H.R. 1954 as reported by the Senate Judiciary Committee includes the elements of S. 783, noted above, and of the Kennedy amendment (S.Amdt. No. 847 re military naturalization and immigration benefits for survivors of servicemembers) to H.R. 1588, the National Defense Authorization Act for Fiscal Year 2004, which passed the Senate by voice vote on June 4, 2003.

H.R. 1588 as passed by the Senate includes an amendment substituting the text of S. 1050 (the Senate bill for the National Defense Authorization Act for Fiscal Year 2004) as well as the Kennedy amendment and the Reid amendment regarding disability and retirement pay. H.R. 1588 as passed by the House contained no provisions for military naturalization and immigration benefits for survivors of

⁴⁶ H.Rept. 108-111 (2003).

servicemembers.⁴⁷ The Senate insisted on its amendment to H.R. 1588; Senate and House conferees were holding meetings as of July 22, 2003. On September 23, 2003, the House voted in favor of instructing their conferees to agree to the Senate-version provisions.

H.R. 1588, as passed by the Senate, and H.R. 1954, as reported by the Senate Judiciary Committee, would reduce the period of service required for naturalization based on peacetime service from 3 years to 2 years; waive fees for naturalization based on military service during peacetime or wartime; permit naturalization processing overseas in U.S. embassies, consulates, and military bases; provide for priority consideration for military leave and transport to finalize naturalization; and extend naturalization based on wartime service to members of the Selected Reserve of the Ready Reserve. They would also expand immigration benefits available to the immediate relatives (spouses, children, and parents) of citizens, including posthumous citizens, who die from injuries or illnesses resulting from serving in combat. Such relatives would remain classified as immediate relatives of a U.S. citizen for immigration purposes, notwithstanding the death of the servicemember, and could self-petition for immigrant status. Immediate relatives must self-petition within 2 years of the date of the servicemember's death or, in the case of posthumous citizens, the date on which posthumous citizenship is granted. Certain adjustment requirements and grounds for inadmissibility would be waived. Children and parents, as well as spouses, would be eligible to naturalize without prior residence or a specified period of physical presence under § 319(d) of the INA (8 U.S.C. §1430(d)). The effective date of the provisions would be September 11, 2001. Additionally, the Senate version of H.R. 1954, like S. 783, would allow the Secretary of Defense or the Secretary's designee within the Bureau of Citizenship and Immigration Services to request posthumous citizenship immediately upon obtaining permission from the next-of-kin; the Senate version of H.R. 1588 does not contain this provision.

Issues of Debate

Some point out that current law already provides for expedited naturalization and that the President has fully exercised this authority. They maintain that current immigration law is quite adequate on these matters. Others argue that there are gaps in current law that need to be addressed. The issues discussed below are some of the major points of debate, but are not exhaustive of all the issues being raised.

Reducing or Eliminating the Service Requirement. Proponents maintain that LPRs who volunteer to serve in the U.S. armed forces are exemplifying

⁴⁷ Although amendments concerning expedited naturalization for military service and posthumous immigration benefits for surviving immediate relatives of citizen servicemembers were submitted for consideration during floor debate on H.R. 1588 and S. 1050, respectively the House and Senate bills on defense authorization for fiscal year 2004, originally, such amendments were not accepted for consideration in the House under the rule in H.Rept. 108-120 for H.R. 1588, nor were they considered relevant under the consent agreement in the Senate for S. 1050. *See* statement of Senator Kennedy at 149 Cong. Rec. S6839 (May 21, 2003).

one of the important roles of a citizen and that anyone who risks death in service to this nation deserves to be recognized as a citizen by virtue of that willingness. They often point to the backlogs and resulting time delays to naturalize under normal procedures and argue that noncitizens in the U.S. military warrant preferential treatment, especially if their ability to continue serving in the military hinges upon becoming a citizen. Others point out that current law already provides for expedited naturalization in time of military conflict and that the President has fully exercised this authority. Some maintain that to eliminate the service requirement during peacetime would create the “wrong” incentive for LPRs to enlist; instead of being rewarded with expedited naturalization as a result of military service, LPRs may enlist as a shortcut to citizenship. Yet others argue reducing, but not eliminating, the service requirement, would address the problem of service members being unable to reenlist due to the naturalization backlogs without creating the “wrong” incentive to enlist. They maintain that since a significant portion of servicemembers do not complete their military commitments, a service requirement of 1 to 2 years is warranted.⁴⁸

Waiving Fees. Some assert that LPRs serving in the military should not have to pay the naturalization filing fees, given the risks they are taking to protect our country even during times not designated as a “period of hostilities.” Waiving the fee, they argue, would be a small gesture of gratitude for their service. Others point out that the processing of immigration and naturalization petitions are all fee-based services not directly supported by appropriations, and as a result, it would be other people who have filed petitions who would be covering the costs of the servicemembers’ petitions. Administration officials have indicated that fees for immigration and naturalization processing would have to be increased if the fees were waived for servicemembers, absent any authorized appropriations for this purpose.

Processing Citizenship Abroad. Some argue that processing citizenship abroad, while well-intended under the current situation, would pose logistical problems and raise the costs of assigning naturalization adjudicators abroad. If officials other than those employed under the direction of the Secretary of DHS processed naturalization petitions, some assert it would set a precedent with potentially far-reaching consequences as well as increase the vulnerability of the naturalization certificates (e.g., to misuse or theft). They maintain that U.S. citizenship should only be granted on U.S. soil and that this view is expressed in the 14th Amendment.⁴⁹ Others cite past laws that authorized the granting of citizenship

⁴⁸ According to Department of Defense data, an average of 15%-20% of servicemembers leave by the end of the first year.

⁴⁹ The proposals to require that naturalization proceedings be available through U.S. embassies, consulates, and military installations overseas raise certain constitutional issues. The Fourteenth Amendment provides that “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” Supreme Court cases and scholarly debate raise an issue about whether persons who are not literally born or naturalized in the United States are citizens under the Fourteenth Amendment or are merely statutory citizens. If they are citizens within

(continued...)

abroad to noncitizens in the military during past wars and argue that similar provisions should be enacted today.⁵⁰ They point out further that DHS already has personnel who process immigration and refugee petitions assigned to consular offices around the world.

Expanding Benefits for Immediate Relatives. Some assert that the noncitizen spouses, children, and perhaps parents, of noncitizens in the military should be treated expeditiously as immediate relatives of U.S. citizens under the INA in the same accelerated manner that the servicemember's naturalization is handled. Others argue that such family members do not warrant special treatment and should be processed under the INA as any other alien who qualifies for a family-based visa would be handled.

Facilitating Posthumous Citizenship. Some have expressed concern that surviving family members should not have to deal with all the paperwork involved in seeking posthumous citizenship and that the Department of Defense and the BCIS should take care of the paperwork once the next-of-kin have given permission. Still others have argued that citizenship should be automatic. Opponents of the latter view point out that not all LPRs may wish to become U.S. citizens, and indeed automatically granting citizenship for them posthumously may complicate matters for their survivors if they owned property or had business interests in their home country. Supporters of current law maintain that naturalization should be an affirmative process initiated by next-of-kin or a legal representative of the deceased.

⁴⁹ (...continued)

the definition of the Fourteenth Amendment, the federal government could not unilaterally strip a person of his or her U.S. citizenship and any statute purporting to do so would likely be found unconstitutional. This issue is relevant for persons who were born in U.S. territories or who were born abroad but are citizens at birth under the citizenship statutes. Aside from these groups of people, who arguably are not citizens under the Fourteenth Amendment of the Constitution but are only citizens by statute, all citizens fall within the scope of the Fourteenth Amendment definition. This language is a definition of citizenship and not necessarily a requirement that naturalization take place within the United States. Arguably, a person who is not literally naturalized in the United States may not be a citizen within the definition of the Fourteenth Amendment which could mean that Congress could revoke citizenship or impose conditions for retention of citizenship which it could not do to Fourteenth Amendment citizens.

⁵⁰ During World War I, a statute providing for naturalization based on military service exempted servicemembers from the requirement that the oath of allegiance be taken "in open court," instead permitting them to follow statutory procedures authorizing embassy and consular officers to administer oaths, affidavits, and other notarized documents which would have the same effect as if administered in the United States. During the Korean hostilities, another statute similarly permitted overseas administrative naturalization based upon military service during that period; naturalization papers still had to be filed in a federal district court with naturalization jurisdiction. However, generally, the naturalization statutes historically and currently have required that applications must be filed and processed within the United States and the ceremony for the oath of allegiance which completes the process must take place, judicially or administratively, within the United States.

Additionally, some argue there may be a legal issue if consent would effectively be eliminated by making posthumous citizenship virtually automatic.⁵¹

Providing Derivative Benefits for Surviving Relatives. Critics of the current restriction on providing derivative immigration benefits for the surviving family members of a noncitizen who died serving in the U.S. military assert that this provision is inhumane. The loss of the ability to obtain immigration benefits and possible deportation due to the death of a servicemember, they maintain, is counter to the spirit of the other provisions of the INA. Supporters of current law argue that surviving family members should be processed under the INA as any other alien who qualifies for a family-based visa would be handled if their petitioning relative died. They warn that expansion of immigration benefits to surviving family members would have implications beyond the desire to grant citizenship through death in the service of the nation.

Revoking Naturalization for Discharge under Other Than Honorable Conditions. As noted above, naturalization under §329 of the INA for wartime military service may be revoked if the citizen is ultimately discharged under other than honorable conditions. To address the concern, discussed above, that reducing or eliminating the service requirement for naturalization based on peacetime service would create the “wrong” incentive for LPRs to enlist, some legislative proposals provide for revocation of naturalization based on peacetime service if the citizen is discharged under other than honorable conditions. However, some assert that revocation of naturalization for subsequent discharge under other than honorable conditions may be unconstitutional.

Generally, the constitutionality of revocation of naturalization, also referred to as denaturalization, is well established,⁵² but this does not mean that Congress has unlimited power to legislate revocation. A ground for revocation might be challenged as arbitrary, punitive or discriminatory. Denaturalization grounds have not yet been successfully challenged. Federal courts adjudicating revocation of naturalization based on military service for discharge under other than honorable conditions have assumed constitutionality of the statute and have merely affirmed that such revocation is discretionary and have ruled on whether revocation is

⁵¹ There is a general principle that citizenship with full substantive rights, as compared to honorary or symbolic citizenship, cannot be conferred on a person without that person’s consent, as reflected in the fact that an oath of allegiance is required in the naturalization statutes. This principle is rooted conceptually in the contract which exists between a person and the government or sovereign. Under U.S. law, a person born in the United States and subject to U.S. jurisdiction has been born into the political community of those who are U.S. citizens. Those who are naturalized to U.S. citizenship originally were citizens of and owed allegiance to other sovereign nations, but have chosen and consented to becoming U.S. citizens. Exceptions include derivative naturalization, where the citizenship of minor children follows that of their parents upon the naturalization of the parents, and collective naturalization, which generally occurs when the United States has acquired a territory from another sovereign nation and conferred citizenship on the residents of that territory. In the latter case, the residents who were natives of the former colonial sovereign generally were permitted the option of remaining citizens of the former sovereign power.

⁵² Charles Gordon et al., *supra* note 25, at §96.08[3].

appropriate under the facts of a particular case.⁵³ Generally, denaturalization occurs when there is naturalization has been obtained through misrepresentation or fraud or some other illegal action. In 1964, the United States Supreme Court held that subjecting citizens naturalized in the United States to retention requirements (conditions subsequent) that did not apply to citizens at birth was unconstitutionally discriminatory as a violation of due process.⁵⁴ The cases that have considered revocation for dishonorable discharge did not involve a challenge to the constitutionality of the statute, so technically, this specific provision has not been found unconstitutional, but these cases predated the Supreme Court case noted above, so arguably revocation for discharge under other than honorable conditions may be unconstitutional. On the other hand, such discharge arguably is a failure to satisfy the original condition of honorable service, which presumed discharge under honorable conditions.

Some argue that military revocation as structured in H.R. 1954, as passed by the House, is constitutional because it has a 5-year aggregate service limit, which is like the denaturalization for becoming a member of a subversive group within 5 years of naturalization. Arguably, it is not the time limit itself but the presumption it raises that makes the difference. In the subversive group provision, becoming a member of a subversive group within 5 years of naturalization is *prima facie* evidence that the citizen lied when s/he claimed to be attached to the United States and the Constitution, but if this is rebutted by other evidence, the citizen will not be denaturalized. The subversive group revocation has never been invoked, so its constitutionality has not been tested, although it may also be unconstitutional because it discriminates between naturalized citizens and citizens at birth. That is, a citizen at birth can join a subversive group at any time and risk losing citizenship. The contemplated amendment would provide that revocation for other than honorable discharge would be possible only within 5-years aggregate service. If a person is a career servicemember, s/he could not be denaturalized for ultimately getting an other

⁵³ See *United States v. Sommerfeld*, 211 F. Supp. 493 (E.D. Penn. 1962); *United States v. Meyer*, 181 F. Supp. 787 (E.D.N.Y. 1960); *United States v. Tarantino*, 122 F. Supp. 929 (E.D.N.Y. 1954). In *Tarantino*, the court rejected the argument of the Federal Government that revocation for discharge under other than honorable conditions must be granted, because to do otherwise would be inconsistent with the fact that an alien who had been discharged under other than honorable conditions would not be eligible to naturalize at all. The court noted that Congress may have recognized that once citizenship had been acquired it should not be automatically forfeited for minor military misconduct which was not incompatible with loyalty to the United States.

⁵⁴ *Schneider v. Rusk* 377 U.S. 163 (1964). This case concerns the rights of citizens naturalized in the United States who therefore are citizens under the Fourteenth Amendment. As discussed above at footnote 49, Congress could not enact statutes to revoke citizenship or impose conditions for retention of citizenship on Fourteenth Amendment citizens. However, a person whose citizenship is based only on statutes and not also on the Fourteenth Amendment could be subject to a condition subsequent; see *Rogers v. Bellei*, 401 U.S. 815 (1971), in which the U.S. Supreme Court held that Congress may impose a condition subsequent of residence in the United States on a person who is merely a statutory citizen and not a Fourteenth Amendment citizen. As noted above, a person who completed naturalization proceedings abroad in accordance with some of the proposed legislation arguably would not be a Fourteenth Amendment citizen.

than honorable discharge. Some believe the revocation provision in H.R. 1954 would discourage/revoke naturalization for those persons who might enlist just so they can become citizens, but really have no interest in or intention of serving their full term of enlistment and who might get an administrative discharge because they couldn't handle military service. In such cases, discharge under other than honorable conditions within 5 years arguably constitutes prima facie evidence that such persons had no genuine intention of serving in the military and therefore should not benefit from expedited naturalization based on military service. Limiting the revocation to 5 years arguably would not hurt those who had a genuine commitment to service, even if they ultimately had problems.

Appendix A

Noncitizens in the Military by Designated Duty State

Duty unit state	Total	Percent of all aliens	Army	USAF	USMC	Navy
Alabama	66	0.2%	48	14	2	2
Alaska	223	0.6%	204	18	1	0
Arizona	299	0.8%	51	97	143	8
Arkansas	60	0.2%	0	60	0	0
California	8396	22.6%	284	253	2679	5180
Colorado	448	1.2%	402	43	0	3
Connecticut	65	0.2%	1	0	2	62
Delaware	65	0.2%	0	65	0	0
District of Columbia	158	0.4%	73	22	35	28
Florida	1663	4.5%	23	202	78	1360
Georgia	753	2.0%	637	67	26	23
Hawaii	1127	3.0%	429	11	264	423
Idaho	51	0.1%	0	50	0	1
Illinois	1076	2.9%	7	46	10	1013
Indiana	8	0.0%	5	0	3	0
Iowa	9	0.0%	8	0	1	0
Kansas	331	0.9%	289	36	1	5
Kentucky	745	2.0%	736	0	8	1
Louisiana	337	0.9%	256	55	19	7
Maine	81	0.2%	0	0	0	81
Maryland	469	1.3%	78	39	37	315
Massachusetts	24	0.1%	9	5	7	3
Michigan	3	0.0%	1	0	2	0
Minnesota	6	0.0%	0	0	3	3
Mississippi	373	1.0%	1	112	12	248
Missouri	235	0.6%	114	45	62	14
Montana	55	0.1%	0	55	0	0
Nebraska	61	0.2%	0	59	0	2
Nevada	135	0.4%	3	115	0	17
New Hampshire	6	0.0%	0	0	4	2
New Jersey	165	0.4%	9	73	6	77
New Mexico	197	0.5%	1	193	3	0
New York	507	1.4%	403	0	52	52
North Carolina	3007	8.1%	1214	80	1502	211
North Dakota	107	0.3%	1	106	0	0
Ohio	42	0.1%	1	40	1	0
Oklahoma	375	1.0%	272	84	13	6
Oregon	10	0.0%	2	0	2	6
Pennsylvania	39	0.1%	5	0	17	17
Rhode Island	32	0.1%	0	0	1	31
South Carolina	667	1.8%	126	89	350	102
South Dakota	48	0.1%	0	48	0	0
Tennessee	16	0.0%	2	0	1	13
Texas	2606	7.0%	1695	684	31	196
Utah	48	0.1%	6	39	3	0

Duty unit state	Total	Percent of all aliens	Army	USAF	USMC	Navy
Virginia	3547	9.6%	365	75	226	2881
Washington	1435	3.9%	551	94	2	788
West Virginia	2	0.0%	0	0	2	0
Wisconsin	3	0.0%	1	0	1	1
Wyoming	25	0.1%	0	25	0	0
Unknown	6923	18.6%	3210	9	1041	2663
Total	37129	—	11523	3108	6653	15845

Source: Department of Defense; data as of February 2003.